2012 WL 8251772 (Mich.App.) (Appellate Brief)
Court of Appeals of Michigan.

Rodica Silvia BIRIS, Plaintiff/Appellant,
v.
INGHAM COUNTY MEDICAL CARE FACILITY, Ingham County Department of Human Services Board, and Fred Frye, an individual, Defendants/Appellees.

No. 310375.
November 5, 2012.

Lower Court Case No. 11-000743-CD
Lower Court Judge Hon. Clinton Canady III
Oral Argument Requested

**Appellant's Brief On Appeal**

Kevin J. Roragen (P56510), Warren H. Krueger, III (P74115), Loomis, Ewert, Parsley, Davis & Gotting, P.C., Attorneys for Plaintiff, 124 West Allegan, Suite 700, Lansing, MI 48933, (517) 482-2400.

Susan Healy Zitterrnan (P33392), Brett J. Miller (P68612), Kitch Drutchas Wagner, Valitutti & Sherbrook, Attorneys for Defendants, 1 Woodward Avenue, Suite 2300, Detroit, MI 48226, (313) 965-7303.

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## ***6 STATEMENT OF THE BASIS FOR JURISDICTION**

This is an appeal of right from the trial court's order granting summary disposition in favor of Defendants/Appellees. The trial court's order was entered on May 2, 2012, and disposed of all outstanding claims as to all parties. Therefore, the May 2, 2012 Order was a "final order." MCR 7.202(6)(a)(i). This Court has jurisdiction of an appeal of right from a final order of the circuit court. MCL 600.308(1)(a); MCR 7.203(A)(1). Plaintiff/Appellant timely filed a Claim of Appeal on May 22, 2012, thus vesting this Court with jurisdiction. MCR 7.204(A)(1).

## *7 QUESTIONS PRESENTED

**1. DID PLAINTIFF/APPELLANT PROVE A PRIMA FACIE CAUSAL CONNECTION BETWEEN HER PROTECTED ACTIVITY AND THE ADVERSE EMPLOYMENT ACTION TAKEN AGAINST HER BY DEFENDANTS/APPELLEES IN SUPPORT OF HER CLAIM UNDER MICHIGAN'S WHISTLEBLOWER'S PROTECTION ACT (MCL 15.361 et seq.) (“WPA”)?**

**Plaintiff/Appellant answers: “Yes”**

**Defendants/Appellees would answer: “No”**

**The trial court answered: “No”**

**2. DID PLAINTIFF/APPELLANT PRESENT SUFFICIENT EVIDENCE TO CREATE AN ISSUE OF FACT REGARDING WHETHER DEFENDANTS/APPELLEES' PROFFERED REASON FOR TAKING ADVERSE ACTION AGAINST PLAINTIFF/APPELLANT WAS A MERE PRETEXT?**

**Plaintiff/Appellant answers: “Yes”**

**Defendants/Appellees would answer: “No”**

**The trial court answered: “No”**

**3. ALTERNATIVELY DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFF/APPELLEE'S CLAIM OF DISCHARGE IN VIOLATION OF PUBLIC POLICY UNDER MCL 333.21771 AS A MATTER OF LAW UNDER MCR 2.116(C)(8)?**

**Plaintiff/Appellant answers: “Yes”**

Defendants/Appellees would answer: “No”

**The trial court answered: “No”**

## *8 STATEMENT OF FACTS

Defendant/Appellee, Ingham County Medical Care Facility (“ICMCF”) is a government operated medical care and rehabilitation facility for the **elderly**. Plaintiff/Appellant, Silvia Biris (“Biris”) was employed by ICMCF as a Certified Nurse Assistant (“CNA”), and worked there from 2005 until 2011. Over that period, ICMCF's human resources director was Defendant/Appellee, Fred Frye (“Frye”). In mid-April 2011, Biris was involved in an investigation into alleged abuse of patients by a fellow CNA, Rhonda Vermillion. Biris was the only employee of the fifty (50) or more interviewed that corroborated Vermillion's alleged misconduct. Afterward, it is undisputed that she was treated much differently by Defendant/Appellees, and her employment was ultimately terminated.

In April 2011, ICMCF received a complaint about mistreatment of a patient by Vermillion. Since it was required to by law, ICMCF investigated the complaint. Julie Pudvay, ICMCF's director of nursing, oversaw the investigation and the completion of the subsequent report (“Report”). Exhibit A, Report. [1] According to the Report, fifty (50) staff members were interviewed, but only Biris corroborated Vermillion's alleged misconduct. Exhibit A, p 3. As part of the investigation, Biris also submitted a written statement describing what misconduct she witnessed. Exhibit B. Biris's Statement. The Report was submitted to the State of Michigan on or about April 22, 2011. Exhibit A.

Afterward, on Saturday, April 30, 2011, Biris suffered an anxiety attack at work ("Episode"). While the severity of the Episode is disputed, it is undisputed that Biris suffered the Episode. An Unusual Occurrence Report ("UOR") regarding the Episode was completed and placed in Frye's work mailbox. Exhibit C, UOR.

***9** The following Monday, May 2, 2011, Frye received and reviewed the UOR, and then called Biris to his office. Exhibit D, p 6, Frye Deposition. Although Biris had a well-documented history of anxiety attacks, some undisputedly more severe than the Episode, that was the first time Frye ever became involved after one. Indeed, in March 2010, Biris suffered an attack where she undisputedly lost consciousness. Exhibit E, pp 45-49, Biris Deposition. But afterward, no one, including Frye and Pudvay, discussed that incident or loss of consciousness with her. However, during the May 2 meeting, according to Biris, Frye presented her with an ultimatum - either she produce a doctor's note guaranteeing she would never suffer another anxiety attack at work, or resign. Exhibit D, pp 6-11; Exhibit E, pp 107-110.[2] That unpalatable ultimatum was also new.

Biris was offered leave under the Family Medical Leave Act ("FMLA") to obtain the doctor's guarantee. Exhibit D, pp 6-11. But Biris pointed out the impossibility of doing so. She further pointed out that even if she took FMLA leave, she would still be unable to produce a doctor's guarantee when the FMLA time ran out and, therefore, refused to take FMLA. Exhibit E, p 115. Nevertheless, Frye ordered Biris off ICMCF's premises until she produced a guarantee. Exhibit D, pp 12-13. Frye testified that despite his initial involvement, he was not aware of Biris's corroboration in the Vermillion investigation. Exhibit D, pp 43-44.

On May 3, 2011, Biris made an emergency appointment with Dr. Domino to discuss Frye's demand. Unsurprisingly, Dr. Domino could not guarantee Biris could work without suffering another attack, and provided a letter to that effect. Exhibit F, Doctor Note. Later that day, Biris met with Frye and Pudvay and provided Dr. Domino's note, and recorded that discussion. Exhibit G, May 3, 2011 Meeting Transcript. Frye found the note unacceptable, and ***10** then changed his demand saying he wanted assurances that she was safe to return to work. Exhibit G, p 3. However, instead of giving Biris an opportunity to obtain a note to that effect from Dr. Domino,[3] Frye demanded that Biris submit to a fitness for duty examination. Exhibit G, pp 10-11. It was also at that time that ICMCF's frustration with the Vermillion investigation surfaced. Specifically, Pudvay expressed frustration with having to complete the Vermillion investigation. Exhibit G, pp 13-14.

Later that same day, Biris attended a fitness for duty examination at WorkHealth conducted by Physician's Assistant, David Walker. Walker's cursory examination consisted of taking Biris's vital signs, discussing the Episode with Biriss, and reviewing her medications. Exhibit H, pp 19-20, Deposition Transcript of P.A. David Walker. Walker testified that no physical exam was completed and that Biris did not present with any obvious or apparent physical problems or issues. Exhibit H, p 19-20.

Walker generated a written report of Biris's examination indicating that he spoke with Frye before the examination. Exhibit I, Walker Report Dated May 2, 2011.[4] His report further states that during the exam, Biris expressed that her complaints about Vermillion were not being taken seriously by ICMCF. Exhibit I. And it was evident that Biris believed that ICMCF and Frye's newfound demands relating to the Episode were rooted in her corroboration of Vermillion's misconduct.

Walker, however, was dismissive of Biris's claims about the various abuses she witnessed at ICMCF. And Walker argued with Biris about Frye's demand for a guarantee stating she would never have another anxiety attack at work. Exhibit I, p 3. Further corroborating the absurdity of Frye's initial demand, Walker told Biris, "no one can write a letter guaranteeing that ***11** one will not have a panic attack, which would be absurd!" Exhibit I, p 3. Ultimately, Walker labeled Biris unfit for work citing a concern over the medications she was taking as prescribed by Dr. Domino. Exhibit I.

On May 4, 2011, Biris again met with Frye. At that time, Frye told her that based on Walker's conclusions he would not allow her to return to work. Exhibit J, pp 10-11. Frye further advised her to obtain a statement from Dr. Domino. Exhbit J, pp 10-11.

Under Frye's advisement, on May 5, 2011, Biris requested WorkHealth's records regarding her examination for Dr. Domino to review. In that regard, she authorized WorkHealth to release and discuss the records with Dr. Domino. Exhibit K, Release. In conjunction with the authorization, she gave WorkHealth Dr. Domino's written request for her records. Exhibit L, Domino Request. She also submitted Dr. Domino's request to ICMCF. According to Dr. Domino, he believed that Biris was capable of fulfilling her CNA duties at all times, but he wanted WorkHealth's records to determine how Walker reached his conclusions. Exhibit M, p 49, Domino Dep; Exhibit L.

In light of Biris's request for WorkHealth's records for Dr. Domino's review, Walker and Frye had another telephone discussion. Walker made record of the discussion in a supplemental report to Biris's file. Exhibit N, Supplemental Report. According to the supplemental report, Frye revealed that his underlying motive for subjecting Biris to the various demands were her complaints about other employees. Walker's supplemental report provides:

Our concern is that Ms. Biris expresses continued feelings of persecution, harassment without any obvious merit and has repetitively went out of her way on several occasions to report alleged “physical abuse or assault” where we have no record of that, and that both an internal and State of Michigan investigation has been found NOT [emphasis in original] to show any wrong doing on behalf of the person accused. *That accused person being taken out of the work environment until she was found not guilty* ***12** *of the alleged charges made by her co-worker, i.e. Ms. Biris. This protracted behavior, her animosity against her employer and if things don't go her way being threatening to “get a lawyer” has made her work situation tenuous.* [Emphasis added]

Exhibit N.

Ultimately, Dr. Domino's record request was totally ignored by ICMCF and WorkHealth. Exhibit D, pp 24-25. Instead, Frye and ICMCF once again increased their demands of Biris. Indeed, although Dr. Domino almost certainly would have provided clearance for Biris to work, despite Walker's conclusions, Frye instead demanded that she attend an independent medical examination (“IME”). However, it was clear to Biris by that point that ICMCF and Frye were simply making continually increased demands in order to prevent her from returning to work. As a result, she refused to continue subjecting herself to those ever increasing demands, and was thereafter terminated by ICMCF.

Biris filed this lawsuit against ICMCF and Frye alleging a violation of Michigan's Whistleblower Protection Act (MCL 15.361 *et seq.*)(“WPA”), or, alternatively, a violation of public policy under MCL 333.21771.[5] The Defendants/Appellees filed a Motion for Summary Disposition (“Motion”) under MCR 2.116(C)(8) & (10) arguing that Biris failed to prove the elements of her WPA claim, and that the public policy claim was barred by the WPA, to which Biris replied arguing that numerous issues of fact existed precluding summary disposition.

The trial court granted the Defendants/Appellee's Motion on both the WPA and public policy claims. Exhibit O, Transcript, May 2, 2012 (“Tran”), pp 49-58. The trial court held that: 1) Biris failed to establish the prima facie element of causation necessary to support her WPA claim (Exhibit O, pp 53-56); 2) Even if a prima facie case was established, Biris failed to present sufficient evidence to create a question of fact regarding whether Defendants/Appellees' ***13** proffered reason for adverse employment action was a pretext (Exhibit O, pp 56-57); and 3) That Biris's public policy claim was preempted by the WPA as a matter of law. Exhibit O, pp 58-59. This Appeal followed.

## *14 LAW AND ARGUMENT

### I. Introduction

Distilled to the simplest form, this Court is being called on to review whether the trial court erred in concluding that Biris failed to support her WPA claim with enough evidence to preclude summary disposition.

The trial court erroneously granted summary disposition in favor of Defendants/Appellees on Biris's WPA claim. In doing so, the court concluded that Biris did not present the requisite prima facie elements. It also found insufficient pretext on Defendants/Appellees part in terminating Biris, which was erroneous because the court confused and overlooked material facts, and misapplied relevant law. It is evident, by properly reviewing the facts and applying the law, that material questions of fact on both causation and pretext must preclude summary disposition, and that Biris's WPA claim must be presented to a jury.

In addition, and in the alternative, the trial court erred in granting summary disposition in Defendants/Appellees' favor, as a matter of law, on Biris public policy claim. Specifically, the court misapplied the WPA's preemption provisions. This Court's rulings are clear that the WPA preempts other remedies only if it applies. But if the WPA is found not to apply, there is no preemptive effect.

Here, it is possible for Biris's public policy claim, which was plead in the alternative, to survive even if the WPA claim fails. However, in overlooking much of the WPA and public policy issues, the trial court presented only one basis for dismissing the public policy claim, WPA preemption. But that basis alone is clearly improper where the WPA is found inapplicable.

Genuine issues of material fact regarding Biris's WPA claim exist. Alternatively, the WPA cannot preempt the public policy claim if it is inapplicable. Thus, the trial courts grant of ***15** summary disposition on those claims should be reversed, and this case should be remanded to the trial court for appropriate further proceedings.

### II. Standard of Review

All of the issues on appeal concern whether the trial court's grant of summary disposition in favor of ICMCF was appropriate. A trial court's decision concerning summary disposition is subject to *de novo* review. *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is decided only by reference to the pleadings. *Merillat v Michigan State University*, 207 Mich App 241, 244; 523 NW2d 802 (1994). In reviewing a motion brought under MCR 2.116(C)(8), the court must accept as true all well-pleaded factual allegations as well as any conclusions that can be drawn from the facts. *Jackson v White Castle System, Inc*, 205 Mich App 137, 139; 517 NW2d 286 (1994). The motion should be granted only if the claim is clearly unenforceable as a matter of law and no factual development could establish the claim and justify recovery. *Id.* at 139-40.

A motion for summary disposition under MCR 2.116(C)(10) should be granted if the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v. Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). The reviewing court must consider the pleadings and documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.*

### III. The Trial Court erred by concluding that Biris failed to meet her burden under the WPA burden-shifting analysis.

The WPA's purpose is to encourage employees to assist in law enforcement, and to protect employees who participate in whistleblowing activities. *Trapanier v National Amusements, Inc*, 250 Mich App 578, 584; 649 NW2d 754 (2002) citing *Dolan v Continental* ***16** *Airlines/Continental Express*, 454 Mich 373, 378; 563 NW2d 23 (1997). For that purpose, it provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

MCL 15.362.

The WPA is further intended to protect the public and promote public health and safety by removing barriers that may interfere with an employee's efforts to report violations or suspected violations of the law. *Id.* citing *Dolan*, at 378-79.

When considering claims under the WPA, a burden-shifting analysis is used. *Taylor v Modern Engineering, Inc.*, 252 Mich App 655, 659; 653 NW2d 625 (2002). The plaintiff has the initial burden of proving a prima facie violation of the WPA. If the plaintiff is successful, the burden then shifts to defendant to articulate a legitimate business reason for the plaintiff's discharge. If the defendant is successful in articulating a legitimate business reason, the burden shifts back to plaintiff to prove that the defendant's proffered legitimate business reasons was a pretext. *Id.* The trial court here erred in concluding that Biris did not prove a prima facie case, or that she did not show that Defendants/Appellees' proffered reasons for adverse employment action were a pretext.

Before turning to the analysis of the WPA claim, a review of a very similar case is appropriate. In *Roulston v Tendercare (Michigan), Inc.*, 239 Mich App 270 (2000), this court ***17** found that a plaintiff nursing home employee presented issues of fact regarding her prima facie burden and the defendant nursing home's pretext under the WPA. The plaintiff witnessed instances of abuse occurring within a nursing home. She reported those incidents to the state and informed the defendant's activities director of her action. *Id.* at 277. The same morning she had the discussion with the activities director, the defendant's administrator contacted his supervisor to discuss firing the plaintiff. *Id.* When plaintiff returned from her lunch that day, the administrator met her in her office, was red in the face, and told her, “you're through.” He stood by while plaintiff gathered her belongings and left the building. *Id.*

While the plaintiff in *Roulston* had no direct evidence that the administrator knew of her reporting, plaintiff theorized that the activities director disclosed that information, which in turn led to her termination. The defendant moved for a directed verdict stating plaintiff failed to present a *prima facie* case under the WPA. The defendant specifically argued that the administrator did not know of plaintiff's reporting before she was fired, and the timing was merely coincidence. *Id.* at 278. In any event, the defendant argued, the firing was due to plaintiff's subpar work performance, not the reporting. *Id.* at 281.

This Court rejected defendant's arguments and directed the WPA claim to be presented to a jury. The Court explained that the evidence supported plaintiff's claim that the activities director informed the administrator prior to the termination. *Id.* at 279. It also said that although there may have been a mixed motive for the termination, there was evidence negating defendant's claimed reason of subpar work performance. *Id.* at 281-82. That was coupled with the timing plaintiff's discussion with the activities director, and the termination. *Id.* Giving the benefit of any reasonable doubt to the plaintiff, as required, the Court concluded that the ***18** plaintiff's proofs could support that a reasonable inference that her termination was retaliation for her protected activity. *Id.* at 282.

The facts here are very similar to *Roulston*, and the outcome should be, as well.

**a. The Trial Court erred by concluding that Biris failed to prove the prima facie elements of her WPA claim.**

The three *prima facie* elements of a WPA claim that a plaintiff is required to show are:
1) she was engaged in protected activity as defined by the act;

2) the defendant discharged her; and

3) a causal connection between the protected activity and the discharge.

*Trapanier, supra* at 583; *Shaw v Ecorse,* 283 Mich App 1, 8; 770 NW2d 31 (2009). The trial court's ruling essentially bypassed the first two elements, and focused on whether Biris established a causal connection between her protected activity and her discharge. However, since this Court must undertake *de novo* review of the trial court's ruling, a brief discussion of all three elements is appropriate.

**i. Biris was engaged in a protected activity under the WPA.**

There are three types of protected activity under the WPA: 1) reporting a violation of the law, regulation, or rule to a public body; 2) being about to report such a violation to a public body; or 3) being asked by a public body to participate in an investigation. *Truel v City of Dearborn,* 291 Mich App 125, 138; 804 NW2d 744 (2010) citing *Ernsting v Ave Maria College,* 274 Mich App 506, 510; 736 NW2d 574 (2007). A "public body" is defined as "any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body." MCL 15.361(d)(iv). A hospital or other medical care facility funded by state or local authority meets that definition. *Hilden v Hurley Medical Center,* 831 FSupp 2d 1024, 1042 (ED Mich 2011).

***19** Here, Biris clearly fell within the third type of protected activity under the WPA: being asked by a public body to participate in an investigation. Biris was asked by ICMCF to participate in an investigation that it was legally required to undertake regarding the complaint of abuse by Vermillion. ICMCF is a public body under MCL 15.361(d)(iv) being operated by the Ingham County Department of Human Services Board. [6] Thus, Biris was engaged in a protected activity.

**ii. The Trial Court found that issues of fact existed regarding whether Biris was terminated.**

A constructive discharge, which is akin to a termination, occurs when an employer deliberately makes an employee's working conditions so intolerable that a reasonable person in the employee's shoes would feel forced to resign. *Hammond v United of Oakland, Inc,* 193 Mich App 146, 151; 483 NW2d 652 (1992). A finding of constructive discharge depends on the facts of each case. *Wolff v Automobile Club of Michigan,* 194 Mich App 6, 15; 486 NW2d 75 (1992).

Biris presented evidence that Defendants/Appellees gave her an ultimatum: take FMLA until she could obtain a doctor's guarantee, or resign. Afterward, they continually changed the demands she had to meet before returning to work. The conditions were intolerable because Defendants/Appellees would create a demand for Biris to meet, but would continuously find fault in her attempts to fulfill the demand. Afterward, instead of allowing her to remedy the alleged faults, or taking minimal efforts to assist her in doing so, they changed and increased the severity of their demand.

Additionally, each demand appeared designed for Biris to fail. First, she was required to produce an impossible guarantee. When she returned with a doctors note proving that guarantee ***20** was impossible, Frye then said he really wanted a note saying she was safe to work. But instead of giving Biris a chance to obtain such a note from Dr. Domino, Frye demanded the WorkHealth exam. Second, Biris saw P.A. Walker who was totally dismissive of her abuse claims, argued with her about Frye's

first demand, and then concluded she was unfit to work based on her medication prescriptions. Dr. Domino disagreed with Walker's conclusion, and Biris submitted his request for WorkHealth's records to ICMCF and WorkHealth, who both ignored it. Instead, Frye demanded an IME.

Finally, it came to a point where Defendants/Appellees told Biris that if she refused to continue attempting to fulfill their demands, they would consider her terminated. Indeed, when she refused to attend the IME, her employment was ultimately terminated. Biris presented sufficient evidence to establish constructive discharge; however, at the very least, there are questions of fact whether Defendants/Appellees conduct constituted a constructive discharge. The trial court did not question this element of the *prima facie* case in its ruling.

**iii. The Trial Court erroneously concluded that Plaintiff failed to present sufficient evidence of a causal connection between the protected activity and discharge.**

The trial court held that Biris failed to produce sufficient evidence to establish a causal connection between her protected activity and discharge as required by the prima facie case. This determination was erroneous, however, since Biris presented sufficient circumstantial evidence to withstand summary disposition under MCR 2.116(C)(10). Circumstantial evidence is sufficient to establish a causal connection if a jury could reasonably infer from the evidence that the employer's actions were motivated by retaliation. *Shaw*, *supra* at 40-41 citing *Taylor*, *supra* at 661. Further, while a temporal relationship between a protected activity and a discharge, standing alone, is not enough to demonstrate a causal connection, when coupled with ***21** other evidence, the temporal relationship may support a causal connection. *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003); *see*, *Henry v City of Detroit*, 234 Mich App 405; 594 NW2d 107 (1999).

A similar situation to Biris's occurred in *Henry*, *supra*. The *Henry* court found sufficient evidence of a causal connection where: 1) a supervisor expressed a belief that the employee's protected activity would cost the employer money; 2) the employee was treated differently after engaging in the protected activity; and 3) the employee was given an ultimatum of taking a demotion or retiring within 4 months of engaging in protected activity. *Supra* at 414. The employee was a highly decorated twenty-eight year veteran commander in the Detroit Police Department ("DPD"). *Id.* He testified in a civil suit that a board of review established to investigate Malice Green's death was not allowed to perform its duties. *Id.* at 407. Before that testimony, he had never been reprimanded and no negative action was taken against him. But after his testimony, the employee was treated differently by his supervisor, and within 4 months was forced to choose between demotion or retirement. *Id.* Although the employer said the reason for its action was the employee's job performance, the court concluded that whether the real reason was job performance or retaliation for the employee's testimony was a question properly left to a jury. *Id.*

Here, Frye expressed his frustration with Biris's reporting of other employees' misconduct to P.A. Walker; Biris was treated differently after cooperating in the investigation; and finally she was given the ultimatum of taking FMLA to obtain an impossible guarantee, or resigning. The ultimatum was given within two weeks after reporting, and upon the first chance ICMCF had a basis to do so. Defendants/Appellees' claim that Biris was merely asked to submit to a reasonable request for an IME; however, Biris had a well-documented history of anxiety ***22** attacks at work and had never previously been required to submit to an IME, or to choose between FMLA or resigning. None of this occurred until she engaged in protected activity under the WPA - participating in the Vermillion investigation. Moreover, Biris was the only employee who corroborated the allegations of abuse against Vermillion, and management at ICMCF was clearly unhappy with that, as evidenced by Frye's supplemental report to Walker.

Prior to corroborating the complaints against Vermillion, she was never subject to the stringent, and impossible, demands such as those imposed after the Episode. And although Frye himself was ICMCF's director of human resources for the entire period Biris worked there, he never was involved after any of her prior attacks. Perhaps most telling is Frye's expression of his general frustration with Biris's continued insistence that the abuse allegations against Vermillion were correct. As expressed to Walker, a reasonable juror could easily conclude that the reason for action taken against Biris was rooted in her complaints and statements in the Vermillion investigation.

In granting Defendants/Appellees' Motion, the trial court confused and overlooked those facts. First, it found that Biris suffered the Episode and that ICMCF sent her for a work fitness examination where she was not cleared to work. Tran p 54. Next, it mistakenly found that she saw Dr. Domino for a guarantee only after the WorkhHealth exam. Tran p 54-55. Finally, it found that ICMCF requested that Biris go to the IME because Dr. Domino could not determine whether she could return to work without WorkHealth's records. Tran p 55. The trial court not only confused the facts, but it mistook Dr. Domino's reason for seeking WorkHealth's records. Additionally, it focused instead on the fact that Defendants/Appellees demanded an IME and Biris refused to go.

***23** More specifically, the trial court confused that Biris saw Dr. Domino after being told to get the guarantee. It overlooked that Frye said the note Dr. Domino provided was insufficient, and that he really did not want a guarantee but rather a clearance for Biris to work. But instead of giving Biris the opportunity to get a clearance note from Dr. Domino, Frye sent her to WorkHealth. Biris complied and subjected herself Walker's cursory exam which resulted in Walker stamping her unfit for work. The court overlooked that Dr. Domino saw no evidence that Biris was unfit to work as a CNA at any time, and that he requested WorkHealth's records in order to understand how Walker reached his conclusion. And despite Dr. Domino's request being conveyed to both ICMCF and WorkHealth, Frye and Walker talked about and then ignored the request altogether, which the trial court further overlooked. It was only after all of that that the IME was finally requested. But at that point, the non-cooperation and shifting of demands became so intolerable that Biris reasonably refused to attend the IME.

Just as in *Henry*, sufficient evidence has been presented creating a question of fact regarding whether a causal connection exists. Therefore, the trial court erred in granting summary disposition for Defendants/Appellees on this basis.

**b. The Trial Court erred by concluding that Appellees did not use Biris's panic attack as a pretext to constructively discharge her.**

Under the burden-shifting framework, once a plaintiff demonstrates a *prima facie* case, the burden shifts to the defendants to come forward with a legitimate business reason for the adverse employment action. If the defendant articulates such an explanation, the burden then shifts to the plaintiff to produce evidence that the employer's explanation is mere pretext. Here, ICMCF claimed that Biris lost her job solely due to her failure to attend an IME or provide a doctor's note following the Episode. In its ruling, the trial court held that Biris failed to satisfy her burden to produce evidence showing that this proffered reason was merely pretext. ***24** However, the trial court failed to apply the proper standard to determine whether a triable issue regarding pretext existed.

To survive summary disposition, the plaintiff's evidence supporting pretext, viewed in the light most favorable to the plaintiff, must permit a reasonable fact finder to conclude that the protected activity was a motivating factor in the adverse action taken by the employer. Taylor, supra at 660. In other words, a triable issue that the employer's proffered reason was a pretext for retaliating against plaintiff's protected activity must be raised. Id. There are four standards for proving pretext in a retaliatory discharge case:
1) Whether participation in a protected activity played any part in the discharge, no matter how remote;

2) Whether the plaintiff's protected activity was a substantial factor in the discharge;

3) Whether the plaintiff's protected activity was the principal, but not sole, reason for the discharge; or

4) Whether the discharge would have occurred had there been no protected activity.

*Roulston, supra* at 281.

A plaintiff can prove pretext either by: 1) directly persuading the fact-finder that a retaliatory reason more likely than not motivated the employer; or 2) indirectly by showing that the employer's proffered explanation is unworthy of credence. *Id.* Moreover, the evidence offered in establishing the *prima facie* case must be considered, and may itself suffice, in determining whether triable issues of fact on the pretext question exist. *Wolcott v Champion Intern Corp*, 691 FSupp 1052, 1058 (WD Mich, 1987).

The trail court found that ICMCF had a legitimate reason for seeking assurances that Biris was fit for work, because of the Episode. Tran, p 56-57. As previously explained, it ***25** focused on Biris's refusal to attend the IME to conclude that no genuine issue of fact regarding pretext existed. Tran, p 57. However, the trial court overlooked that this was not a circumstance where Biris suffered the Episode and then ICMCF immediately requested the IME. Indeed, numerous material events occurred between Episode and the IME request. Specifically, Frye and ICMCF kept amending and increasing their demands, and Frye explicitly said the reasons for their action was Biris's reporting of other employees.

Moreover, requiring an IME was not part of ICMCF's established practice or policy. The Defendants/Appellees produced no evidence to substantiate that any policy was in place requiring IMEs. Further, while Biris's own history contains instances of similar attacks, some clearly more severe and pervasive, she was never previously required to attend an IME, or choose between FMLA or resignation.

Biris raised a triable issue of pretext. Taken together with her prima facie case, the evidence of pretext was sufficient to preclude summary disposition. In addition to Frye's statements mentioned above, Frye never took part in dealing with Biris's anxiety attacks until she corroborated Vermillion's misconduct. The extreme demands Biris was subject to after the Episode were not only unpalatable, but never existed for attacks occurring prior to the Vermillion investigation. The evidence presented a triable issue of whether Frye and ICMCF acted out of a retaliatory motive rather than a legitimate business interest. For that reason, summary disposition should not have been granted for Defendants/Appellees on this basis.

**IV. The Trial Court erred in concluding that the WPA barred Biris's public policy claims, even though it determined that the WPA was inapplicable.**

As an alternative to Biris's WPA claim, she plead a violation of public policy under MCL 333.21771. Although Biris believes that the elements of a WPA claim are present, in the event the WPA claim is found inapplicable either by the trial court or a fact finder, the public policy ***26** claim remains unless supporting evidence is not presented. Here, instead of finding a lack of supporting evidence to dismiss the public policy claim, the trial court simply dismissed it under MCR 2.116(C)(8) as preempted by the alternatively plead WPA claim. However, that basis alone is insufficient to dismiss the public policy claim, and, therefore, the trial court's ruling must be reversed.

The trial court ruled that the WPA and Biris's public policy claim under MCL 333.21771 covered the same set of facts. As such, it summarily concluded that the WPA provided the exclusive remedy barring the public policy claim, despite the Court's determination that the WPA was inapplicable. Tran, p 58-59. The WPA is an exclusive remedy for an employee whose employment is terminated in retaliation for reporting an employer's violation of the law. *Shuttleworth v Riverside Osteopathic Hosp.*, 191 Mich App 25, 27; 477 NW2d 453 (1991). However, this Court has made clear that the WPA precludes corollary claims only if it is found applicable. *See, Driver v Hanley (After Remand)*, 226 Mich App 558; 575 NW2d 31 (1997); *see also, Deneau v Manor Care, Inc*, 219 F Supp 2d 855 (2002).

In *Driver*, the court specifically explained that the WPA only bars corollary claims when it applies. 226 Mich App at 566. There, the plaintiff brought claims regarding her discharge based on public policy, breach of contract, and the WPA. The public policy claim was dismissed on a separate basis, but the contract claim was dismissed by the trial court solely on the basis that it was excluded by the WPA. *Id.* Later, the WPA was found inapplicable by the trial court. *Id.* The trial court denied the plaintiff's motion to reinstate the contract claim when the WPA claim was deemed inapplicable. *Id.* However, this court reversed the trial court's denial of the plaintiff's motion and reinstated her claim. *Id.* It explained "the circuit court determined that the ***27** WPA

was not applicable to the facts regarding plaintiff's discharge. Because the WPA provided no remedy at all, it could not have provided plaintiff's exclusive remedy." *Id.*

As Driver illustrates, an alternative public policy claims brought with a WPA claim is not precluded by the WPA if it is found inapplicable. In that event, the otherwise barred public policy claims remain available. That is certainly possible here as the maintaining a WPA claim requires a plaintiff to report or be about to report a violation of the law to a public body. MCL 15.362. But, at the time Ms. Biris filed her Amended Complaint, the basis for the public policy claim, MCL 333.21771, did not contain any such requirement. It protected nursing home employees who simply reported misconduct to the nursing home administrator or nursing director. MCL 333.21771 (prior to Amendment effective June 19, 2012). See, Deneau, supra at 868-71. Thus, it was entirely possible for Ms. Biris to lose on the WPA claim, but have a public policy claim under MCL 333.21771.

Since the trial court found the WPA inapplicable here, the WPA could not preempt Biris's public policy claim. Moreover, the statutory public policy claim was based on MCL 333.21771, not the WPA. Thus; the public policy claim is not barred per se by the WPA claim because if the WPA claim is applicable, the public policy claim, at best, may only be precluded by the WPA. And a failure to meet the WPA's requirements does not automatically result in a failure of the public policy claim. Accordingly, and even if this Court is not persuaded that Biris's WPA claim should be submitted to a jury, this matter must be remanded to the trial court for a determination whether Biris has presented sufficient evidence of a public policy claim under MCL 333.21771.

## *28 CONCLUSION & RELIEF REQUESTED

The trial court erred in granting summary disposition in favor of the Defendants/Appellees. Upon review of the record in this matter, this Honorable Court should **REVERSE** the erroneous decision of the trial court, and **REMAND** this matter for further proceedings.

Footnotes

1 All of the exhibits attached hereto were previously included as Exhibits or attachments to the Defendants' Motion for Summary Disposition and/or Plaintiff's Response in Opposition thereto, and thus constitute a part of the record in this matter.

2 Frye and ICMCF dispute that any "guarantee" was required. Clearly, this is a question of fact which must be resolved in Biris's favor for summary disposition purposes.

3 Dr. Domino testified that he saw no evidence that Biris was incapable of fulfilling her CNA duties, Exhibit L, p 49, Deposition Transcript of Lawrence Domino.

4 Walker's Report is misdated as May 2, 2011 instead of May 3, 2011.

5 MCL 333.21771(6) prohibits licensed nursing homes and/or their employees or administrators from retaliating against an employee who reports abuse, mistreatment, or **neglect** of a patient.

6 It is undisputed that ICMCF is a public body. See, e.g., Defendants' Motion for Summary Disposition at p 3.

**End of Document**